Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

O. L. MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

GREGORY ALLEN PETTY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct in stating the nature of the case with the following addition:

1. On March 7, 1984, Gregory Allen Petty filed his Petition for a Writ of Habeas Corpus on a form such as is annexed by Rule 2(c) to the Rules Governing Section 2254 Cases.

SUMMARY OF ARGUMENT

In his habeas corpus petition, Petty's allegation of ineffective assistance of counsel was not supported by a pleading of "prejudice." Instead of giving notice to Petty of the defect, with an opportunity for Petty to amend, the district court dismissed Petty's petition. The Fifth Circuit's decision to remand, which provides an opportunity for Petty to amend his petition, is supported by the general rule that dismissals based on defects in pleading should not be made on the merits. Hence, the Fifth Circuit's decision is appropriate and the State of Texas' Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. Dismissals Due to Defects in Pleading Are Not Normally Made on the Merits.

The first paragraph of the Fifth Circuit's opinion explained that "the district court dismissed this claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions." *Petty v. McCotter*, 779 F.2d 299, 300 (5th Cir. 1986). The Fifth Circuit agreed that Petty's petition was defectively pled, and therefore remanded Petty's habeas action with instructions to the district court to allow Petty to amend his petition to plead "prejudice."

The Fifth Circuit's decision was necessary because the district court's judgment "denied and dismissed" Petty's petition with no opportunity to amend. *See* State's Appendix F. If the district court's judgment were to stand as written, then the State of Texas would take the position, as it has in its Petition for Writ of Certiorari, that the district court's judgment was "made on the merits." In the future, as Petty sought to properly plead "prejudice" in accordance with *Hill v. Lockhart*, —— U.S. ——, 106 S.Ct. 366 (1985), Petty would face the State's defense of abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254.

Such a result is not in keeping with the rule that a dismissal based upon a defect in pleading, such as a *Hill*-type defect, should not be made on the merits. As this Court wrote in *Costello v. United States*, 365 U.S. 265, 286 (1961):

> If the first suit was dismissed for defect of the pleading, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit.

Further, a dismissal with prejudice for failure to state a claim is inappropriate unless it appears "beyond doubt" that no set of facts can be proven to support the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Fifth Circuit was not convinced that it was "beyond doubt" that Petty could prove facts to support his claim, nor does the district court's judgment so state. Therefore, the Fifth Circuit's decision to remand the case with an opportunity for Petty to amend is entirely appropriate.

II. Petty's Pleading Defect was In Part Due To His Use of the Form Annexed to the Rules Governing Section 2254 Cases.

In its opinion the Fifth Circuit recommended that district courts modify the standard forms provided to *pro se* habeas petitioners to require them to specifically allege prejudice when pleading ineffectiveness of counsel. *Petty v. McCotter*, *supra*, at 302. Presently, as well as at the time Petty filed his petition on March 7, 1984, the form annexed to the Rules Governing Section 2254 Cases instructs *pro se* habeas petitioners as follows:

> State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

There is no mention in the form that "prejudice" should be pled by *pro se* habeas petitioners. In fact, there is no suggestion that a *pro se* habeas petitioner must allege

any additional facts in an ineffective assistance case other than the facts that would be sufficient to state any of the other nine constitutional complaints listed on the form.

Pro se petitions, such as Petty's petition, should be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 520 (1972). This should be especially true when the *pro se* petitioner has pled in accordance with a form provided for his use by federal rules. For this reason as well, the Fifth Circuit remanded with an opportunity for Petty to amend his petition. Any other resolution of this case would allow the trial court's judgment "on the merits" to stand, thereby prejudicing Petty's future attempts to replead in accordance with *Hill* and *Strickland v. Washington*, 466 U.S. 668 (1984).

III. The Fifth Circuit's Opinion Is Not Inconsistent with *Hill v. Lockhart*.

To the contrary of the State of Texas' argument that the Fifth Circuit's opinion conflicts with *Hill*, the Fifth Circuit actually requires Petty to amend his petition to plead prejudice pursuant to *Hill*. The Fifth Circuit required such an amendment despite its observation that "the most efficient resolution of this appeal would be to remand for an evidentiary hearing without the formality of requiring that pleadings be amended to allege what is already set out in the briefs before this Court." *Petty v. McCotter*, *supra*, at 302.

IV. The Fifth Circuit's Review of Matters Outside the Record Did Not Affect Its Opinion.

In the first paragraph of its opinion, the Fifth Circuit recognized that it could not consider the many facts that suggest possible prejudice which were set out by Petty for the first time on appeal. *Petty v. McCotter*, *supra*, at 299. Though the Fifth Circuit did discuss and

comment upon certain of those facts in its opinion, the facts which Petty raised for the first time upon appeal play no necessary part in the decision to remand. The important issue is not whether the facts at this time are within or without the record. The important issue at this point in time is simply whether the district court's dismissal for a defect in pleading should have been made on the merits.

The district court had procedures available to it to bring the pleading defect to the attention of a *pro se* habeas petitioner such as Petty. The Rules Governing Section 2254 Cases provide a procedure for which an insufficient petition should be returned to the petitioner "together with a statement of the reason for its return." Rule 2(e), 28 U.S.C. fol. 2254. This procedure was not followed by the clerk of the district court, nor did the district judge direct the clerk to follow such a procedure. Instead, the district court ordered the State to respond under Rule 4, 28 U.S.C. fol. 2254.

Rule 4, 28 U.S.C. fol. 2254 provides for summary dismissal of petitions when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." When summary dismissal is appropriate, the Fifth Circuit requires specific notice and a reasonable opportunity for the habeas petitioner to respond. *Norman v. McCotter*, 765 F.2d 504 (1985). Either of these steps would have brought the pleading defect to Petty's attention at a time when he could have properly amended his petition. Because neither step was taken, the only chance Petty had to learn of the pleading defect prior to the Fifth Circuit's opinion was the magistrate's Report and Recommendation. *See*, State's Appendix C. Yet by the time the magistrate's report was issued, Petty's petition had already passed the summary dismissal stage at which a layman, especially a *pro se* habeas petitioner, would expect to have been advised of a pleading defect. The Fifth Circuit's decision to remand

is well founded on these facts and does not rely upon facts outside the record for its validity.

CONCLUSION

Petty's habeas petition was found to be defectively pled by both the district court and the Fifth Circuit. Petty failed to follow the specific pleading rule of *Hill* and *Strickland*. However, his pleadings followed the instruction of the form he was provided. To dismiss his petition on the merits is overly harsh under the circumstances. Such a dismissal would operate, through no fault of Petty, to create another State defense to his habeas action. By remanding with instructions to allow amendment, the Fifth Circuit took the step that should have been taken by the district court two years ago. Therefore, Respondent prays that the State of Texas' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in all respects.

Respectfully submitted,

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